FILE NO. A18-1967

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action against KARLOWBA R. ADAMS POWELL, a Minnesota Attorney, Registration No. 0327335.	**[DIRECTOR'S PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION FOR DISCIPLINE**

The above-captioned matter was heard on July 23 and 24, 2019, by the undersigned acting as Referee by appointment of the Minnesota Supreme Court. Binh T. Tuong, Senior Assistant Director, appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Bobby Joe Champion appeared on behalf of respondent Karlowba R. Adams Powell, who was present throughout the proceedings.

The hearing was conducted on the Director's petition for revocation of probation and for further disciplinary action (petition) filed on October 31, 2018. Director's Exhibits 1-30 (D. Ex.) were received into evidence. Respondent's Exhibits 100-108 (R. Ex.) were also received into evidence. The Director presented the testimony of Referee Mary Madden, Diana Longrie, Nicole Frank, Jeremy Stirewalt, Joanne (Sumrall) Hill, and respondent. Respondent also testified on her own behalf.

The parties were directed to submit on or before August 12, 2019, proposed findings of fact, conclusions of law, a recommendation for appropriate discipline and memorandum of law. The Referee's findings of fact, conclusions of law and recommendation are due to the Supreme Court by September 17, 2019.

In her answer to the petition (R. ans.), respondent admitted certain factual allegations, denied others and stated she did not have knowledge to admit or deny

other allegations. The findings and conclusions made below are based upon respondent's admissions, the documentary evidence submitted by the Director, the testimony presented, the demeanor and credibility of respondent as determined by the undersigned and the reasonable inferences to be drawn from the documents and testimony. If respondent's answer to the petition admits a particular factual finding made below, then even though the Director may have provided additional evidence to establish the finding, no other citation will necessarily be made.

Based upon the evidence as outlined above, and upon all of the files, records and proceedings herein, the referee makes the following:

FINDINGS OF FACT

1. Respondent Karlowba R. Adams Powell was admitted to practice law in Minnesota on September 18, 2003. Respondent currently practices law in St. Paul, Minnesota.

2. By order dated July 19, 2017, this Court suspended respondent from the practice of law for a minimum of 45 days and ordered that upon reinstatement, respondent be placed on probation for two years (D. Ex. 1).

3. Respondent's discipline was based upon her failure to appear in court on behalf of a client in violation of Rules 1.1, 1.3, 3.4(c), and 8.4(d), Minnesota Rules of Professional Conduct (MRPC), and failure to cooperate with the Director's investigation in violation of Rule 8.1(b), MRPC, and Rule 25, Rules on Lawyers Professional Responsibility (RLPR) (D. Ex. 1).

4. On September 25, 2017, respondent was conditionally reinstated and placed on probation for two years (D. Ex. 17). Among the conditions of respondent's probation were the following:

a. Respondent shall abide by the Minnesota Rules of Professional Conduct.

b. Respondent shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation. Respondent shall promptly respond to the Director's correspondence by its due date.

5. Respondent has committed the following unprofessional conduct warranting revocation of probation and further public discipline. (D. Ex. 17.)

False Statements to a Tribunal, the Director, and Others, and Unauthorized Practice of Law in the Benjamin Bump Matter

6. On July 19, 2017, the Court ordered respondent suspended from the practice of law for a minimum of 45 days effective as of the date of the order (D. Ex. 1).

7. Respondent represented Benjamin Bump on a matter with two court file numbers (27-FA-16-4324 and 27-DA-FA-16-2940) in Hennepin County District Court. Family Court Referee Mary Madden presided over the matters (D. Exs. 2 and 3). On August 1, 2017, respondent appeared as counsel for Mr. Bump at a review hearing (Madden test.; Longrie test.; R. test.). Review hearings are routinely set when the court wishes to make sure the parent is making progress with the programming (Madden test.; Longrie test.). At the review hearing, the parties discussed how to move the case(s) forward and possible trial or future hearing dates (Madden test.; Longrie test.). Also present at the review hearing were opposing counsel Diana Longrie and the guardian ad litem Jean Hariman (GAL) (Madden test.; Longrie test.).

8. Respondent's appearance on behalf of Mr. Bump constituted the unauthorized practice of law because respondent engaged in legal practice while respondent's license to practice law was suspended as of July 19, 2017 (Rule 5.5, MRPC; D. Ex. 1).

9. Respondent is responsible for reading the Court's order and clarifying any confusion with the order. Respondent is responsible for knowing the status of her own attorney license. Respondent, as a licensed attorney practicing for 15 years, should know that the Court's final order controls and supersedes the underlying stipulation,

particularly since the stipulation states that the stipulation is a recommendation and acknowledges that the Court can impose any level of discipline. Even if respondent has a good faith belief that she was permitted to appear at the August 1, 2017, review hearing, this does not mean respondent did not engage in the unauthorized practice of law. There is no "knowing" requirement in Rule 5.5(a), MRPC. *In re Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016) (affirming private admonition for attorney's practice of law in Minnesota by negotiating, via email, with Minnesota attorney regarding satisfaction of Minnesota judgment involving representation of Minnesota resident, where attorney wrongly believed that he was permitted to negotiate settlement without being licensed in Minnesota).

10. Referee Madden and Ms. Longrie testified about what happened at the review hearing. Both testified consistently about what respondent stated at the hearing and they both are credible. Respondent does not deny the basic facts of what happened at the hearing. Referee Madden's and Ms. Longrie's testimonies support the following facts by clear and convincing evidence.

11. In Referee Madden's chambers prior to the hearing, the parties discussed, among other things, dates for scheduling future hearings and pre-trial conferences (Madden test.; Longrie test.; R. test.). A number of dates were suggested, including August 8, 11, and 21, 2017 (R. test.; Ex. 6). Respondent informed Referee Madden that she would be unavailable for those specific dates and unavailable to attend any hearings until September 16, 2017 (Madden test.; Longrie test.). When asked by Referee Madden the reason respondent was unavailable for such an extended period of time, respondent stated that she had vacations scheduled and two trials coming up (Madden test.; Longrie test.; R. test.; D. Ex. 6).

12. Referee Madden and Ms. Longrie both testified that respondent failed to disclose to Referee Madden, Ms. Longrie and the GAL at any time during the hearing, both in chambers and in open court, that respondent could not make any appearances

prior to September 16, 2017, because respondent was suspended from the practice of law as of July 19, 2017, for at least 45 days (Madden test.; Longrie test.).

13. Respondent's statements to Referee Madden and Ms. Longrie that she was unavailable for future hearings until September 16, 2017, were knowingly false as evidenced by the following facts:

a. The upcoming vacations that respondent claimed made her unavailable for any appearance until after September 16, 2017, included only a four-day trip to Texas in August (August 9-13) (D. Ex. 5) and two trips scheduled for ***after*** September 16, 2017 (D. Ex. 6; R. test.). Therefore, the only period prior to September 16, 2017, that respondent was unavailable for a hearing due to a vacation was August 9, 2017, through August 13, 2017 (D. Ex. 6; R. test.).

b. Respondent has offered inconsistent statements regarding her reason for not being able to appear at the August 8, 2017, hearing. In her first response to the Director's notice of investigation, respondent indicated that her stated reason for not being able to attend the August 8, 2017, hearing was because she would be in Texas on vacation (D. Ex. 11). After the Director asked respondent to provide travel confirmation of her Texas trip, and it showed her flight did not leave until August 9, 2017, in the evening, in a subsequent response to the Director's request for information, respondent stated that her reason was because of her suspension (D. Ex. 6). At trial, respondent stated that she blocked off her schedule for vacation, even though she did not leave for Texas until August 9, 2017 (R. test.).

c. On August 7, 2017, respondent finally revealed to Referee Madden and Ms. Longrie that she could not attend the August 8, 2017, hearing because of her suspension (D. Ex. 7). By this time, respondent was required to give notice of her suspension (Ex. 1, ¶ 2). The suspension was the true reason for respondent not being able to attend the August 8, 2017, telephone hearing, as stated in

respondent's August 7, 2017, email (D. Ex. 7). Respondent does not mention being on vacation or blocking off time for vacation as her reason for her unavailability in the August 7, 2017, email (D. Ex. 7). Respondent continued to email the parties on August 8, 2017, the date she supposedly blocked off her schedule for her Texas vacation (D. Ex. 9). Respondent's statement to Referee Madden and Ms. Longrie about the reason respondent was unavailable on August 8, 2017, was knowingly false.

d. The upcoming trials that respondent stated made her unavailable for any appearance until after September 16, 2017, were trials scheduled for August 21 and September 18, 2017 (D. Ex. 6). Respondent's suspension from the practice of law spanned the period of July 19, 2017, through September 25, 2017 (when respondent was reinstated) (D. Exs 1 and 17). Therefore, respondent was unable to engage in the practice of law or be available to prepare for or attend any trials until after her license was reinstated (D. Exs 1 and 17). Contrary to respondent's representation, those trials could not be the reason she was unable to attend any hearings until September 16, 2017, in the Bump matter. Respondent's claim that her trial schedule was the reason she was unavailable until September 16, 2017, was knowingly false.

e. By the August 1, 2017, review hearing, respondent had received the Court's July 19, 2017, order regarding her suspension from the practice of law (R. test.). Respondent was unable to make any appearances until after her reinstatement on September 25, 2017, because of her suspension, not because of her vacations or trials (D. Exs. 1 and 17).

14. Respondent's reasons for why she did not reveal the suspension at the August 1, 2017, hearing are not credible in light of the evidence.

a. Respondent claims that she was not aware the she needed to inform Referee Madden, Ms. Longrie and Ms. Hariman of respondent's

suspension at the time (R. test.). However, pursuant to the Court's suspension order and Rule 26, RLPR, respondent was obligated to notify Referee Madden and Ms. Longrie of her suspension by July 31, 2017 (D. Ex.1; Rule 26, RLPR). Respondent claims she wrote letters to Referee Madden and Ms. Longrie on July 28, 2017 (which she sent out on August 1, 2017), and therefore knew at a minimum that they were entitled to notice of the suspension (R. test.; D. Exs. 13 and 14).

b. Respondent also claimed she did not inform the parties at the review hearing because there was no obligation (other than the Rule 26 notice) for her to reveal that information (R. test.). But respondent acknowledged that there was nothing to prevent or prohibit her from revealing her public suspension at the review hearing (R. test.). In contrast, the rules relating to candor to the court and honesty in the course of representing a client obligate respondent to tell the truth and to reveal the suspension information, particularly since it is the true reason respondent is unable to appear for future hearings until September 16, 2017. Respondent's omission of a material fact caused misapprehension, confusion and wasted the court's time.

15. Because the parties were unaware of respondent's suspension, a telephone hearing was nonetheless scheduled for August 8, 2017 (Madden test., Longrie test.).

16. When agreeing to schedule the August 8, 2017, telephone hearing, respondent assured Referee Madden that she would find an attorney to attend in her place (Madden test.; D. Ex. 4).

17. Respondent was unable to find an attorney to attend the August 8, 2017, telephone hearing in her place (D. Ex. 7; R. test.). On August 7, 2017, respondent sent an email to Referee Madden and Ms. Longrie asking to continue that August 8, 2017, telephone hearing (D. Ex. 7). At this time, respondent indicated that she was unable to attend the hearing because of her suspension (D. Ex. 7).

18. In addition to informing the parties (the GAL was subsequently copied in on the email chain) of her suspension and inability to attend the August 8, 2017, telephone hearing, respondent addressed, on behalf of her client, other matters, including her client's position regarding the GAL's proposal (D. Ex. 7). In the email, respondent stated:

> Please be advised [Bump] doesn't not agree with the GAL's proposal and wants her to complete a neuro-psych exam as she was previously ordered before therapy would begin. [X] has been having nightmares since he learned of the potential therapy . . . . His therapist has attempted to contact the GAL to no avail.

(D. Ex. 7.)

19. During the email conversation, respondent even tried to steer the conversation to focus on substantive issues, rather than respondent's suspension, stating in an email dated August 8, 2017, "The focus of our emails should be Re-scheduling the phone conference and the concerns addressed in Mr. Bump's letter sent to you and the Court as they Reiser [sic] to what is in the best interest of [the child]." (D. Ex. 9.)

20. Respondent's discussion of her client's case with Referee Madden, Ms. Longrie and the GAL in the August 7, 2017, email constituted the unauthorized practice of law because respondent engaged in legal practice while respondent's license to practice law was suspended.

21. Respondent's claim that she was not communicating with Referee Madden, Ms. Longrie and the GAL in her capacity as her client's attorney is not credible. Respondent is the attorney of record (Madden test.; Longrie test.; R. test.; D. Exs. 2 and 3). Respondent had been representing Mr. Bump for over a year (Madden test.; Longrie test.; R. test.). Respondent's contention that she never stated in the email

that she was writing in her capacity as Mr. Bump's attorney and therefore she was not, is not persuasive.

22. Respondent never indicates in what capacity respondent was discussing her client's case, if not as his attorney (R. test.). Further, in respondent's initial answer to the Director's notice of investigation, respondent acknowledged that she should not have engaged in substantive discussion about her client's case because she was suspended (D. Ex. 11). Respondent's trial testimony is inconsistent with respondent's previous responses to the Director on this issue (R. test.), which makes her testimony not credible. Respondent is responsible for her representations to the Director in the course of the Director's investigation and cannot later disavow her previous statements to the Director when convenient, particularly since respondent failed to offer any evidence from her attorney that would indicate that her attorney did not accurately represent respondent's claims at that time.

23. Because respondent was unable to attend the August 8, 2017, telephone hearing due to her suspension, and because respondent was unable to find an attorney to appear in respondent's place on Mr. Bump's behalf, the August 8, 2017, telephone hearing was continued (despite strong objections from Ms. Longrie to a long continuance) until August 28, 2017, thus delaying the case (Madden test.; Longrie test.; D. Exs. 2, 3, and 9). Respondent's actions burdened the court and the other parties in the case.

24. During the course of the Director's investigation, and in response to Referee Madden's complaint regarding respondent's conduct, respondent stated to the Director that the reason respondent did not mention the suspension was because at the time of the August 1, 2017, hearing she did not believe her suspension was for "public consumption and something that she would be in the position to disclose." (D. Ex. 11.) This statement is knowingly false. The Court's suspension order ordered respondent to "comply with Rule 26, RLPR (requiring notice of suspension to clients, opposing

counsel, and tribunals)." Rule 26(b), RLPR, provides that a suspended lawyer "shall notify each client, opposing counsel (or opposing party acting pro se) and the tribunal involved in pending litigation . . . as of the date of the . . . order imposing discipline . . . ." Rule 26(c), RLPR, provides that, "Notices required by this Rule shall be sent by certified mail, return receipt requested, within ten (10) days of the Court's order."

25. Respondent was required to provide notice to Referee Madden and Ms. Longrie of her suspension by July 31, 2017 (ten days from the Court's July 19, 2017, order was July 29, 2017, which fell on a Saturday and, therefore, the Director could consider July 31, 2017, as the date by which respondent had to mail these notices). Respondent was aware that she had an obligation to notify Referee Madden and Ms. Longrie of respondent's suspension, and respondent's Rule 26 notices to Ms. Longrie and to the court were dated July 28, 2017 (R. test.; D. Exs. 13 and 14).

26. Respondent was aware her suspension was public and that it needed to be disclosed when she attended the August 1, 2017, hearing. Respondent's lack of candor and failure to promptly notify the court and the parties of her suspension earlier in the proceedings burdened the court and the judicial process by causing unnecessary delays and waste of court time and resources (Madden test.; Longrie test.).

27. During the course of the Director's investigation, the Director asked respondent whether the August 8, 2017, telephone hearing had to be continued (R. test.; D. Exs. 6 and 11). Respondent stated in written responses, and under oath at a deposition, that she was able to find an attorney to appear in her place and that the August 8, 2017, telephone hearing occurred (D. Exs. 6, 11 and 30 at p. 28, ll. 3-10).

28. In response to the notice of investigation relating to the Madden complaint, respondent, through her attorney, stated in a letter dated September 22, 2017, "It should be noted that Ms. Adams Powell's statement that 'I will have to try and get someone to cover that' was in fact a goal that was achieved since the matter did in

fact take place on August 8th, and a licensed attorney was present for her client." (D. Ex. 11.) In response to the Director's request for additional information, respondent, through her attorney, stated in a letter dated October 26, 2017, "The August 8, 2017 telephone conference was not continued. Ms. Adams Powell was in fact able to secure counsel to appear at the August 8, 2017 telephone conference." (D. Ex. 6.) Respondent made these statements knowing they were false. Respondent did not find an attorney to appear in her place on August 8, 2017, and the August 8, 2017, telephone hearing was cancelled and continued to August 28, 2017 (Madden test.; Longrie test.; R. test.).

29. Respondent's claim of mistake is not credible. Respondent could have looked up the information before responding to the Director to ensure her response was accurate and truthful. Respondent on two occasions, in response to written requests for information, stated the hearings were not continued (D. Exs. 6 and 11). During trial, respondent attempted to claim that she meant the hearings were continued to August 28, 2017 (R. test.). But respondent's written representations are clear that she stated the August 8, 2017, hearing was not continued and that they occurred (D. Exs. 6 and 11). Respondent's claim that she meant the hearing occurred on August 28 instead of August 8, 2017, is not credible. This statement, made twice in writing to the Director, was knowingly false.

30. During a deposition taken on September 12, 2018, respondent again claims the August 8, 2017, telephone conference was not continued:

Q: Okay. And did you have another attorney appear on your behalf on August 8?

A: I did.

Q: On August 8?

A: Yes. The telephone --

Q: The telephone conference was not continued or canceled?

A: Yes, ma'am

(D. Ex. 30 at p. 28, ll. 3-10).

31. While a misstatement made once may be a mistake, stated in writing twice and then under oath at a deposition, demonstrates a disregard for the truth. Respondent's numerous statements, to the Director in writing and under oath at her deposition, were knowingly false.

Additional Unauthorized Practice of Law and Failure to Provide Proper Receipt for Cash Payments in the Jamier Sumrall Matter

32. On or about June 23, 2017, Joanne Hill (formerly Sumrall) hired respondent to represent her daughter, Jamier Sumrall, in three separate criminal matters (Hill test.). When discussing the representation, Ms. Hill made clear that the case was urgent and that there was a hearing scheduled for August 12, 2017, that needed to be handled (Hill test.). When discussing with Ms. Hill the potential representation of Ms. Sumrall, respondent failed to inform Ms. Hill that she had signed a stipulation for suspension and that she may be suspended from that practice of law in the near future (Hill test.; R. test.).

33. Respondent's fee for the representation was $3,000 and Ms. Hill paid respondent $1,500 in cash up front (Hill test.; R. test.).

34. Respondent provided Ms. Hill with a receipt for the cash payment; however, that receipt was not countersigned by the payor as required by Rule 1.15(h), MRPC, as interpreted by Appendix 1, Section II(2), thereto (D. Ex. 15).

35. On July 19, 2017, the Court ordered respondent suspended from the practice of law for a minimum of 45 days, effective as of the date of the order (D. Ex. 1). After receiving the order, respondent did not inform Ms. Hill or Ms. Sumrall of respondent's suspension, despite the suspension being in effect on the date of the hearing (Hill test.). Respondent never informed Ms. Hill of respondent's suspension and did not inform Ms. Sumrall until August 1, 2017 (R. test.).

36. Despite her suspension from the practice of law, respondent continued her legal representation of Ms. Hill's daughter (Hill test.; R. test.). Between July 24 and 31, 2017, respondent consulted with Ms. Hill and others about Ms. Sumrall's case and provided legal advice and consultation for which she invoiced Ms. Sumrall for the legal work (D. Ex. 16; R. test.).

37. On August 1, 2017, respondent contacted a Dakota County district court clerk and the prosecutor on the case regarding a possible continuance of the case (D. Ex. 16.).

38. Respondent admits during this period she worked on Ms. Sumrall's file and discussed the case with others in respondent's capacity as Ms. Sumrall's attorney (D. Ex. 16; R. test.).

39. Ultimately, respondent's representation of Ms. Sumrall was terminated, and Ms. Hill had to quickly find a replacement attorney to handle the case within a two-week time period (Hill test.). While Ms. Hill was able to obtain the result she desired, she paid the replacement attorney $10,000 to handle the case within two weeks (Hill test.).

40. Due to respondent's misconduct, Ms. Hill experienced stress about her daughter's case and concerns about whether the matter would be handled on time (Hill test.).

Failure to Safeguard Client Funds and Additional False Statements to the Director

41. On September 25, 2017, respondent's license to practice law was conditionally reinstated (D. Ex. 17). As part of the conditions of respondent's reinstatement, she was placed on supervised probation for two years (D. Ex. 17). The Court's order requires that respondent "shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation. Respondent shall promptly respond to the Director's correspondence by its due date." (D. Ex. 17.) Further, the

Court's order requires that respondent "abide by the Minnesota Rules of Professional Conduct." (D. Ex. 17.)

42. On January 17, 2018, respondent met with Nicole Frank and other members of the probation department of the Director's Office because respondent did not yet have a probation supervisor assigned (Frank test.).

43. During the meeting, the Director's Office requested that respondent provide several randomly selected client files for review, which included respondent's client files for Mr. Bump and Robert Walker (Frank test.). After reviewing those files, the Director's Office discovered that respondent's flat fee agreements in those cases did not comply with Rule 1.5(b), MRPC (Frank test.).

44. In the Bump matter, respondent and Mr. Bump entered into a flat fee retainer agreement on August 18, 2016 (D. Ex. 18). The flat fee agreement provided that respondent would represent Mr. Bump in his family law case for a flat fee of $2,500 (D. Ex. 18). The flat fee agreement did not disclose that the fee would not be held in a trust account until earned; that the client had the right to terminate the client-lawyer relationship; and that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided, as required by Rule 1.5(b)(1), MRPC (Frank test.; D. Ex. 18).

45. Further, the fee agreement states, "**This is a flat fee and non-refundable.**" (Frank test.; D. Ex. 18.) (Bold in original.) Under Rule 1.5(b)(3), MRPC, such a provision is impermissible. Because respondent's flat fee did not comply with Rule 1.5(b)(1), MRPC, respondent was obligated to place any unearned fees in trust pursuant to Rule 1.15(a) and (c)(5), MRPC (Frank test.).

46. Mr. Bump paid respondent for the family law representation as follows: $255 on July 26, 2016; $1,000 on July 29, 2016; and $1,250 on August 15, 2016 (D. Ex. 19). None of these payments were placed in respondent's trust account (R. test.; Frank test.). By August 15, 2016, Mr. Bump had paid respondent the full $2,500 flat fee (D. Ex. 19;

R. test.). Respondent did not complete the agreed-upon services until December 11, 2017, and did not fully earn the $2,500 flat fee until that date (R. test.; D. Ex. 21). Therefore, all or at least a portion of the $2,500 Mr. Bump paid to respondent should have been placed into trust until December 11, 2017, when it was fully earned (Frank test.; Rule 1.15(a) and (c)(5), MRPC).

47. In the Walker matter, respondent and Mr. Walker entered into a flat fee agreement on April 25, 2017 (D. Ex. 22). The flat fee agreement provided that respondent would represent Mr. Walker in his family law case for a flat fee of $2,500 (D. Ex. 22). The flat fee agreement did not disclose that the fee would not be held in a trust account until earned; that the client had the right to terminate the client-lawyer relationship; and that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided, as required by Rule 1.5(b)(1), MRPC (D. Ex. 22).

48. Further, the fee agreement states, "**This is a flat fee and non-refundable.**" (Bold in original.) Under Rule 1.5(b)(3), MRPC, such a provision is impermissible (Frank test.; D. Ex. 22). Because respondent's flat fee does not comply with Rule 1.5(b)(1), MRPC, respondent must place any unearned fees into trust pursuant to Rule 1.15(a) and (c)(5), MRPC (Frank test.).

49. Mr. Walker paid respondent for the family law representation as follows: $600 on February 22, 2017; $1,150 on March 29, 2017; $500 on May 15, 2017; and $250 on June 15, 2017 (D. Ex. 19). None of these payments were placed in respondent's trust account (R. test.; D. Ex. 19). By June 15, 2017, Mr. Walker had paid respondent the full $2,500 flat fee (R. test.; Ex. 19). Respondent did not complete the agreed-upon services until April 20, 2018, and respondent did not fully earn the $2,500 until that date (D. Ex. 24; R. test.). Therefore, all or at least a portion of the $2,500 Mr. Walker paid to respondent should have been placed into trust until April 20, 2018, when it was fully earned (Frank test.; Rule 1.15(a) and (c)(5), MRPC).

50. The Director's Office asked respondent where she placed any unearned portion of fees in the Bump and Walker matters, and respondent indicated that she had placed such funds into her trust account and agreed to provide proof of those deposits (Frank test.).

51. Respondent testified that she told Ms. Frank that she was not sure where the money went but would check. Respondent's testimony is not supported by the evidence, while Ms. Frank's testimony is supported by the evidence.

52. In all follow-up discussions regarding the Bump and Walker deposits, Ms. Frank asked respondent numerous times for proof of deposit into her trust account, not where the money was deposited (D. Exs. 25-27). The assumption was that the funds were deposited into respondent's trust account, which would only be the case if respondent represented that it was, in fact, placed into her trust account.

53. On January 23, and again on February 21 and 23, 2018, the Director's Office followed up with respondent about the promised proof of deposits into the trust account (D. Exs. 25-27). Respondent delayed in providing the requested information until the end of March 2018 (D. Ex. 19).

54. Prior to March 2018, however, respondent was in communication with Ms. Frank and part of the communication revealed that the fees at issue were not placed into her trust account (Frank test.). Respondent disclosed that those fees were, in fact, placed in respondent's personal account (Frank test.). Again, if, as respondent testified, her response to Ms. Frank was that she did not know where the funds were deposited, and therefore had to check, the fact that she discovered the funds were placed into respondent's personal account would end the discussion. Yet, respondent claimed that the deposits into her personal account were not as she intended (R. test.; D. Ex. 19). It is unclear how respondent knew she intended for the deposits to be placed into trust, when she claimed initially that she did not recall where those funds were deposited.

Ms. Frank's testimony that respondent told Ms. Frank the funds were placed into trust is credible.

55. Ms. Frank testified that when the Director's Office questioned respondent about her representations that Mr. Bump's and Mr. Walker's funds were placed into her trust account, respondent claimed that the handwriting on the deposit slips directing that both Mr. Bump's and Mr. Walker's funds be deposited into the personal account was not her own handwriting (either partially or entirely) (Frank test.; D. Ex. 19). Ms. Frank further testified that respondent claimed that she contacted Wells Fargo to inquire about this issue and spoke with Jeremy Stirewalt, a bank employee, who told respondent that placement of the funds into respondent's personal account, rather than into her trust account, was a bank teller's error (Frank test.).

56. Ms. Frank requested that respondent provide documentation from the bank verifying the error (Frank test.; D. Ex. 27). Respondent stated that Mr. Stirewalt did not assist respondent at the time of the deposits, and he did not provide respondent with anything in writing to verify the deposit of Mr. Bump's and Mr. Walker's funds into respondent's personal account was a bank error (Frank test.; D. Ex. 19). Respondent provided no further explanation of the bank error (Frank test.; D. Ex. 19). Ms. Frank's testimony is credible and supported by the record.

57. Mr. Stirewalt testified that deposits are made at the customer's direction (Stirewalt test.). While a teller may assist a customer in completing a deposit slip, the specific account into which a deposit should be made is dictated by the customer (Stirewalt test.). Therefore, the responsibility to ensure funds are deposited into the proper account falls to the customer, who can verify the deposit by reviewing the deposit receipt (Stirewalt test.). Respondent made the deposits in question in 2016 and 2017, and inquired from Mr. Stirewalt about these deposits in 2018 (Stirewalt test.). Mr. Stirewalt testified that it would be difficult, especially without investigation, to determine a bank error on a deposit at *any* time, much less a deposit made a year or two

earlier (Stirewalt test.). Mr. Stirewalt was never asked to investigate further into how the funds that respondent claimed she intended to deposit into her trust account were deposited into her personal account (Stirewalt test.). Mr. Stirewalt testified that he is certain he did not state to respondent that the deposits made into the "wrong" account were a "bank error." (Stirewalt test.) This is because the transactions were made too long ago and, absent further investigation, that conclusion could not be made (Stirewalt test.). Mr. Stirewalt also testified the reason he refused to write a letter stating the deposits were placed into the personal account was in bank error was because there is no way he could confirm that claim (Stirewalt test.). The undersigned finds Mr. Stirewalt's testimony credible.

58. Based on the record and the credible testimony of Ms. Frank and Mr. Stirewalt, the undersigned finds respondent's statements to the Director about depositing the unearned fees into her trust account to be knowingly false. Respondent is responsible for making deposits relating to these fees, and should know where the deposits were made. Further, respondent believed she had a valid flat fee agreement, which would have allowed her to place the advanced fees into her personal or business account. It would make sense for respondent to place such funds into her personal account. Respondent's claim that she placed the funds into her trust account (after being informed that her flat fee agreement was invalid) is therefore not credible.

59. Respondent's subsequent actions evidence that respondent knew the Bump and Walker funds were not placed into trust. Over the course of one year, respondent never noticed her personal account had more money than it should (R. test.). If respondent intended for the funds to be placed into trust, she should have been accounting for the funds, attributing them to her clients and reconciling her trust account as required by the Rules of Professional Conduct (Frank. test.; Rule 1.15, MRPC). At no time over the course of the years did respondent notice shortages in her trust account (R. test.). When respondent finally earned the fees in the Bump and

Walker matters at the conclusion of the representation, respondent never transferred the funds from the trust account into her personal account (R. test.).

60. After Ms. Frank demanded proof of the deposits, respondent falsely told Ms. Frank that the placement of the funds into her personal account rather than into the trust account was due to bank error and that Mr. Stirewalt told respondent it was due to bank error.

61. The undersigned finds respondent's statements regarding her conversations with Mr. Stirewalt were knowingly false. Mr. Stirewalt's testimony that he would not have told respondent that the deposits were bank error is credible, particularly since respondent's claim that she intended to place the funds into trust when she believed she had a valid flat fee agreement, which would have allowed her to place the funds into her personal or business account, is not credible.

62. The record and testimony evidences that respondent placed the advanced fees into her personal account because she believed she had a valid flat fee agreement that allowed her to do so, but when she was informed that her flat fee agreement was not valid, she made a false statement to the Director that she placed the funds into her trust account. When the Director asked respondent for proof that the deposits were made into her trust account, to cover her false statement, respondent made another false statement that her bank deposited the funds into the wrong account and the incorrect deposits were "bank error." Respondent knew the statements were false when she made them.

Aggravating and Mitigating Factors

63. A lawyer's prior disciplinary history is an aggravating factor. *See In re Mayrand*, 723 N.W.2d 261, 269 (Minn. 2006). Respondent has a history of prior discipline as follows (Exs. 28-29):

a. On July 19, 2017, respondent was suspended for 45 days for failing to attend a court hearing and failing to cooperate with the Director in violation of Rules 1.1, 1.3, 3.4(c), 8.1(b), MRPC and Rule 25, Rules on Lawyers Professional Responsibility.

b. On May 16, 2016, respondent received an admonition for her conduct in failing to diligently pursue a client's representation and failing to keep the client advised of the status of the representation in violation of Rules 1.3 and 1.4, MRPC.

c. On April 10, 2007, respondent received an admonition for failing to act with reasonable diligence and promptness and failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of Rules 1.3 and 1.4(b), MRPC.

64. Engaging in misconduct while on disciplinary probation is an aggravating factor. *See In re Winter*, 770 N.W.2d 463, 468 (Minn. 2009). The current misconduct occurred while respondent was on public disciplinary probation, a condition of which requires respondent to abide by the Minnesota Rules of Professional Conduct.

65. Committing intentional misconduct is an aggravating factor. *In re Fru*, 829 N.W.2d 379, 390 (Minn. 2013). Respondent's misconduct was intentional. Respondent knew she was suspended, and knew that her suspension would be relevant and material to a scheduling conference. Respondent ignored the court's suspension order and engaged in the unauthorized practice of law on three occasions. While on probation, respondent continued to engage in misconduct by making false statements to the Director and then making additional false statements to cover them up. While the Court has indicated that it will not consider intentional misconduct as an aggravating factor when one of the elements of the violation requires "knowing false statement" as is the case for Rules 3.3(a), 4.1, and 8.4(c), MRPC, since Rule 8.4(d), MRPC (as well as Rules 1.15(c)(5), 1.15(h), and 5.5(a), MRPC), do not have an intent

requirement, the Court has held for violations of such rules, intentional nature of misconduct is an aggravating factor. *See In re Sea*, No. A17-1548 at *7 __ N.W.2d. __ (August 7, 2019).

66. Respondent refused to acknowledge her misconduct, exhibited no remorse for her misconduct, and failed to offer any evidence or assurance that she will not engage in similar future misconduct (R. test.), which is an aggravating factor. *See In re Westby*, 639 N.W.2d 358, 371 (Minn. 2002) ("[B]ecause [the lawyer] does not acknowledge that she committed any misconduct, she might engage in similar conduct in the future unless she is appropriately sanctioned."); *In re Ray*, 610 N.W.2d 342, 347 (Minn. 2000).

67. Respondent's conduct at trial is also an aggravating factor. In a case about candor to the court, the Director, and others, respondent displayed a lack of candor with the court during her own testimony. The Court has held that making additional misrepresentations aggravates the sanction. *Ulanowski* 800 N.W.2d 785, 792, 802 (Minn. 2011).

68. Respondent neither claimed nor offered evidence of any legally recognized mitigation of the sanction for her misconduct.

CONCLUSIONS OF LAW

1. Respondent's conduct in appearing at the August 1, 2017, review hearing and representing her client in a series of emails dated August 7, 2017, while not licensed to practice law, violated the Court's July 19, 2017, suspension order and Rules 3.4(c) and 5.5(a), MRPC.

2. Respondent's conduct in falsely telling Referee Madden, Ms. Longrie and the GAL that she was unable to schedule any hearings until after September 16, 2017, due to two trials and upcoming vacations violated Rules 3.3(a)(1), 4.1, and 8.4(c) and (d), MRPC.

3. Respondent's conduct in falsely telling Referee Madden, Ms. Longrie and the GAL that she was unable to attend a telephone hearing on August 8, 2017, due to a vacation violated Rules 3.3(a)(1), 4.1, and 8.4(c) and (d), MRPC.

4. Respondent's conduct in falsely telling the Director that the August 8, 2017, telephone hearing occurred and was not continued and that she found another attorney to appear for Mr. Bump violated Rules 8.1(a) and 8.4(c) and (d), MRPC.

5. Respondent's conduct in falsely telling the Director that respondent did not mention the suspension because she did not know her suspension was for "public consumption and something that she would be in the position to disclose" violated Rules 8.1(a) and 8.4(c) and (d), MRPC.

6. Respondent's conduct of accepting a cash payment of $1,500 and failing to provide her client a receipt that is countersigned by the payor violated Rule 1.15(h), MRPC, as interpreted by Appendix 1, Section II(2), thereto.

7. Respondent's conduct of continuing to represent Ms. Sumrall while suspended from the practice of law violated the Court's July 19, 2017, suspension order and Rules 3.4(a) and 5.5(a), MRPC.

8. Respondent's conduct in failing to promptly respond to requests for information from the Director's Office during the course of respondent's supervised probation violated Rule 8.1(a), MRPC, and the July 19, 2017, and September 25, 2017, orders.

9. Respondent's conduct in falsely claiming that fees were deposited into a trust account when they were deposited into a personal account violated Rules 8.1(a) and 8.4(c) and (d), MRPC.

10. Respondent's conduct in falsely claiming that the named bank employee told respondent deposits made into her personal account rather than into her trust account were due to bank teller error violated Rules 8.1(a) and 8.4(c) and (d), MRPC.

11. Respondent's conduct of failing to deposit unearned fees into a trust account, absent a compliant flat fee agreement, violated Rule 1.15(c)(5), MRPC.

12. Respondent's disciplinary history aggravates the sanction.

13. Respondent's current misconduct, which occurred while respondent was on public disciplinary probation, aggravates the sanction.

14. Respondent's intentional misconduct aggravate the sanction.

15. Respondent's repeated failures to recognize and acknowledge the wrongful nature of her conduct or to express remorse for her misconduct stating she caused no harm to clients, the public or anyone, aggravate the sanction.

16. Respondent's additional misrepresentations at trial aggravate the sanction.

17. There is no factor which mitigates the sanction for respondent's misconduct.

RECOMMENDATION FOR DISCIPLINE

Based on the foregoing findings and conclusions, the undersigned recommends:

1. Respondent, Karlowba Adams Powell, be indefinitely suspended from the practice of law, ineligible to apply for reinstatement for a minimum of six months.

2. The reinstatement hearing provided for in Rule 18, RLPR, not be waived.

3. Reinstatement be conditioned upon:

   a. Compliance with Rule 26, RLPR;

   b. Payment of costs, disbursements and interest pursuant to Rule 24, RLPR;

   c. Successful completion of the professional responsibility examination pursuant to Rule 18(e), RLPR;

   d. Satisfaction of continuing legal education requirements pursuant to Rule 18(e), RLPR; and

4. Proof by respondent by clear and convincing evidence that she has undergone moral change, is fit to practice law and that future misconduct is not apt to occur.

Dated: _____, 2019.

RICHARD C. PERKINS
SUPREME COURT REFEREE